United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-1503

To be argued by
Stuart R. Shaw, Esq.

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

-against-

JEREMIAH EDWARD SCANLON,

Appellant.

No. S 73 Cr. 790

BRIEF FOR APPELLANT

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TABLE OF CONTENTS

	Page
CITATIONS AND AUTHORITIES.....	i
ISSUES TO BE PRESENTED.....	1
STATEMENT OF FACTS.....	2-6
ARGUMENT.....	7-27
POINT I DEFENDANT-APPELLANT, A CITIZEN OF IRELAND, DID NOT FULLY UNDERSTAND HIS RIGHTS. HIS ADMISSIONS WERE TAKEN UNDER DURESS, FEAR, COERCION AND THROUGH MISUNDERSTANDING. THUS, ANY STATEMENTS MADE BY THE DEFENDANT-APPELLANT HEREIN MUST BE SUPPRESSED.....	7-9
POINT II THE SUBSTANCE ALLEGED TO HAVE BEEN IN THE POSSESSION OF THE DEFENDANT-APPELLANT AND WHICH HE IS CHARGED WITH POSSESSING WITH INTENT TO DISTRIBUTE AND CONSPIRACY SO TO DO, WAS, IN FACT, NOT A CONTROLLED SUBSTANCE. THE INDICTMENT IS THUS, ON ITS FACE, FAULTY, AND MUST BE DISMISSED.....	10-13
POINT III THE HEARING HELD ON JUNE 11 and 12, 1973 EVEN THOUGH LABELED AS A 'BAIL HEARING' OR A 'BAIL MODIFICATION HEARING' WAS OBVIOUSLY A HEARING INTO THE SUBSTANCE AND 'PROBABLE CAUSE' OF THE ALLEGED CRIMINAL ACTIVITIES OF THE DEFENDANT-APPELLANT, AND THUS AMOUNTED IN ALL RESPECTS TO A PRELIMINARY HEARING..	14-18
POINT IV FAILURE TO PROVIDE DEFENSE COUNSEL WITH MINUTES OF THE HEARING OF	

JUNE 11 and 12, 1973, WAS SO PREJUDICIAL TO THE DEFENDANT-APPELLANT AS TO WARRANT A DISMISSAL OF THE INDICTMENT HEREIN..... 19-25

POINT V

COUNSEL MOST RESPECTFULLY PROCEEDS IN HIS CAPACITY AS A FRIEND OF THE COURT IN URGING THAT THE INDICTMENT HEREIN BE DISMISSED..... 26-27

CONCLUSION..... 28

CITATIONS AND AUTHORITIES

	Page
Britt v. North Carolina, 404 U.S. 226.	19
Escobedo v. Illinois, 378 U.S. 478.	8
Federal Rules of Criminal Procedure, Section 5. 1. (c)	22
Moore's Federal Practice, Section 5. 1. 02	15
United States Constitution, Fifth Amendment	19
United States Code, Section 812	10
United States ex rel Kelly v. Wilson, 408 F. 2d 896.	24
United States ex rel Wheeler v. Flood, 269 F. Supp. 194.	19
United States ex rel Wilson v. McMann, 408 F. 2d 895.	23
Washington v. Clemmer, 339 F. 2d 715.	19
White v. Maryland, 373 U.S. 59.	8

ISSUES TO BE PRESENTED

1. STATEMENTS MADE BY DEFENDANT TO AGENTS OF THE BUREAU OF NARCOTICS AND DANGEROUS DRUGS OR ANY OTHER FEDERAL AGENTS WERE MADE UNDER STRESS, MISUNDERSTANDING AND COERCION.

2. LIDOCAINE, THE SUBSTANCE WITH WHICH THE DEFENDANT IS CHARGED AS POSSESSING; POSSESSING WITH INTENT TO DISTRIBUTE; AND CONSPIRACY, WAS IN FACT, NOT A CONTROLLED SUBSTANCE UNDER U.S. CODE § 812.

3. A HEARING HELD HEREIN ON JUNE 11 AND 12, 1973, ALTHOUGH REFERRED TO AS A 'BAIL MODIFICATION HEARING' ACTUALLY INQUIRED IN DEPTH INTO THE SUBSTANCE OF THE DEFENDANT'S ALLEGED CRIMINAL ACTIVITIES AND THE MERITS OF THE CHARGES AGAINST HIM AND WAS EQUIVAIENT TO BEING A PRELIMINARY HEARING.

4. FAILURE TO PROVIDE DEFENDANT-APPELLANT AND HIS COUNSEL WITH MINUTES OF THE HEARING OF JUNE 11 AND 12, 1973, WAS SO PREJUDICIAL AS TO WARRANT A DISMISSAL OF THE INDICTMENT HEREIN.

STATEMENT OF FACTS

On June 8, 1973 JEREMIAH EDWARD SCANLON, defendant-appellant was arrested in New York City by two agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) for an alleged sale of cocaine.

An investigation by the Government dated June 12, 1973 revealed that Mr. Scanlon did not, in fact possess cocaine, but instead was allegedly in possession of Lidocaine, a non-controlled substance (p. 7)*

Despite this fact, on or about June 13, 1973, an indictment was handed down by the Grand Jury sitting in and for the Southern District of New York (Indictment #S 73 Cr. 578, charging Mr. Scanlon with intent to distribute and possession of 52 grams of cocaine hydrochloride (p. 1). A superceding indictment was obtained, however, charging Mr. Scanlon with possession with intent to distribute a Schedule I and II narcotic drug and conspiracy so to do (P. 2-3), indictment # S 73 Cr. 746; and finally, a third superceding indictment (Indictment #S 73 Cr. 790) was filed on August 10, 1973 charging Mr. Scanlon with possession with intent to distribute a Schedule I and II drug and conspiracy so to do (Count I), and possession of 55 grams of cocaine hydrochloride (Count II) (p. 4-6).

* References are to pages in Defendant-Appellant's Appendix

Shortly after June 15, 1973, defendant-appellant was transported from the Federal Detention Facility at West Street, New York, New York to the Facility at Danbury, Connecticut where he was incarcerated for some three (3) weeks without notice to counsel. When in Danbury, the defendant-appellant was visited by agents of the BNDD and was interrogated by them. (p. 28).

On June 11 and 12, 1973, a hearing was held before Magistrate Schreiber in the Southern District of New York which hearing has been referred to as a 'bail modification hearing,' but which was, in fact, equivalent to a preliminary hearing. At this hearing two agents of the BNDD testified as to their part in the surveillance and arrest of the defendant-appellant. (p. 21).

On August 13, 1973, the defendant-appellant, Mr. Scanlon, pleaded not guilty to the charges against him.

Approximately two and one-half (2 1/2) months after the hearing of June 11 and 12, 1973, Mr. Roland Thau, Esq., of the Legal Aide Society was relieved by Stuart R. Shaw, Esq., as counsel for Mr. Scanlon.

Some time in the month of September, 1973, Mr. Shaw, defendant-appellant's new counsel requested minutes of the hearing of June 11 and 12 as he had not been counsel at the time of said hearing. The minutes of this hearing had been recorded by a tape machine rather than

transcribed by an official court stenographer as is the usual custom in the District Court. Counsel was informed by the official court reporters that the five reels of tape recording covering the proceedings of June 11 and 12 were available. Counsel attempted to listen to them and found that they were unintelligible and that they could not be transcribed.

Upon learning of this situation, Magistrate Jacobs ordered these five reels of tape to be sent to one Jan Kweit (p. 8) to whom all tapes initially deemed to be unintelligible are ordinarily sent by the Magistrate's Court. Ms. Kweit is the Court-chosen expert in this capacity.

In a letter to counsel dated October 12, 1973 (p. 9) Ms. Kweit confirmed that the tapes were inaudible and unintelligible and that, in fact:

> "The records were full of static and the voices were so low that it was impossible to hear what was being said. A few words here and there were audible, but not even as much as a sentence at a time."

Therefore, on November 7, 1973 counsel moved to dismiss the indictment herein on the grounds of the unavailability of a transcript of the hearing of June 11 and 12, 1973. Said hearing had lasted for two days, and the testimony at the hearing concerned the substantive

issues of the alleged crime and the merits of the charges against Mr. Scanlon. Such an absence of a record of the proceeding represented irreversible prejudice to the defendant-appellant.

This motion was respectfully brought before the Court (Weinfeld, J.) on behalf of Mr. Scanlon, and, in addition, in counsel's capacity as a friend of the Court (p. 37). Counsel wished at that time and continues to attempt by the filing of this appeal, to do all in his power to insure that such a harmful incident does not occur again.

Relying on the sworn affidavits of Mr. Thau, defendant-appellant's former counsel, and on the affidavit of one of the agents at said hearing, it is submitted, upon information and belief, that Frederick S. Lough, an agent of the BNDD testified as to his part as agent in charge of surveilling Mr. Scanlon. Agent Fekethe, also of the BNDD testified that the defendant never passed any contraband to him at any time in this matter. Agent Fekethe further testified as to his undercover duties in regard to Mr. Scanlon's arrest. Both agents testified that the substance allegedly seized from Mr. Scanlon was cocaine and not lidocaine, as in, fact, it was lidocaine. Both agents continued to state that it was cocaine.

On November 30, 1973 the motion to dismiss

the indictment on the abosesaid grounds was denied (Weinfeld, J.).

Upon this ruling of the Court, Mr. Scanlon withdrew his plea of not guilty and entered a plea of guilty to the first count of Indictment #S 73 Cr. 790 the third superceding indictment) charging him with possession with intent to distribute a Schedule I and II narcotic drug and conspiracy so to do. (p. 57).

On January 24, 1974, Mr. Scanlon was sentenced to a term of imprisonment of two (2) years with three years special probation upon the termination of incarceration.

On February 11, 1974, a notice of appeal was filed with the Court of Appeals for the Second Circuit on behalf of Mr. Scanlon (p.31).

POINT I

DEFENDANT-APPELLANT, A CITIZEN OF IRELAND, DID NOT FULLY UNDERSTAND HIS RIGHTS. HIS ADMISSIONS WERE TAKEN UNDER DURESS, FEAR, COERCION AND THROUGH MISUNDERSTANDING. THUS, ANY STATEMENTS MADE BY THE DEFENDANT-APPELLANT HEREIN MUST BE SUPPRESSED.

The defendant-appellant, a citizen of Ireland and a resident of Great Britain, was not versed in even a minimal knowledge of or familiarity with American jurisprudence; not even that commonly possessed by American laymen.

More specifically, according to Irish statute, only written statements made by a suspect can be used against him in a Court of law. No oral statements under any circumstances can be used as evidence. The defendant-appellant, in being told of his rights, interpreted them as such. He therefore believed thatanything not written by him would not be held against him in a Court of law.

Defendant was transferred to the Federal Facility at Danbury, Connecticut from the Facility at West Street, New York City. His counsel at that time was not informed of this transfer. According to the affidavit of Roland Thau, Esq., his counsel at that time, datedthe 10th day of August, 1973, in support of his motion to supress:

"On information and belief shortly after June 15, 1973, the defendant was transported from the Federal House of Detention for Men in New York City to a federal detention center in Danbury, Connecticut where he was detained some three weeks, without notice to counsel. "

"On information and belief, during the defendant's incarceration in Danbury, he was visited there by two or more BNDD agents without advise to or consent from counsel; was interrogated and made certain statements to the authorities."

"Counsel did not learn of the defendant's transfer to Danbury until after his return therefrom, and was not consulted by any law enforcement person prior to any interview conducted there."

It is submitted that such tactics on the part of the Government are abhorrent and illegal. Therefore, any and all statements made by the defendant-appellant to an agent of the BNDD or any other federal employee are inadmissible in a Court of law.

Miranda v. Arizona, 384 U.S. 436;
Escobedo v. Illinois, 378 U.S. 478;
White v. Maryland, 373 U.S. 59,60.

Further, the statements taken by the Government from the defendant-appellant were taken while the defendant was incarcerated on a charge which the government knew beforehand, or by the exercise of due diligence should have known to be false. For the indictment under which the defendant-appellant was being charged and held at that time

alleged his possession of cocaine, and the defendant did not possess cocaine. By its own investigation, by its own report dated June 12, 1973, at least three days before the defendant-appellant was transported to Danbury, and thus by its very own admission, the government was well aware of the fact that the defendant-appellant in fact possessed a non-controlled substance deemed to be Lidocaine. (See Point II, infra).

In light of these overwhelming injustices and the overt deprivation of Mr. Scanlon's rights as above noted, any and all statements made by the defendant-appellant must be suppressed.

POINT II

THE SUBSTANCE ALLEGED TO HAVE BEEN IN THE POSSESSION OF THE DEFENDANT-APPELLANT AND WHICH HE IS CHARGED WITH POSSESSING WITH INTENT TO DISTRIBUTE AND CONSPIRACY SO TO DO, WAS, IN FACT, NOT A CONTROLLED SUBSTANCE. THE INDICTMENT IS THUS, ON ITS FACE, FAULTY, AND MUST BE DISMISSED.

On or about June 13, 1973, the defendant-appellant was charged under indictment #S 73 Cr. 578 with unlawfully attempting to distribute and possession with intent to distribute a Schedule II narcotic drug (i.e. 52 grams of cocaine hydrochloride).

However, by its own investigation, the Government knew on June 12, 1973, before the indictment was handed down, that the substance allegedly seized from the defendant-appellant was in fact, not cocaine, but Lidocaine, which is neither a Schedule I nor a Schedule II controlled substance pursuant to U.S. Code § 812. Lidocaine is not a controlled substance at all. On July 31, 1973, a full six weeks later, defense counsel was informed of the Government's discovery.

Within an hour after this disclosure, defense counsel moved to dismiss the indictment as faulty. The Government requested an adjournment in order that it might file a superceding indictment. It did so and indictment

S 73 Cr. 746 was secured charging the defendant with conspiracy to distribute and possession with intent to distribute a Schedule I and II narcotic substance. Thereafter, the Government procured a third indictment, #S 73 Cr. 790 (the first count to which Mr. Scanlon pleaded guilty) charging the defendant with conspiracy and possession with intent to distribute a Schedule I and II narcotic substance (Count I thereof) and possession of 55 grams of cocaine (Count II).

As is noted above, Lidocaine, the substance allegedly seized from the defendant-appellant, is neither a Schedule I narcotic substance, a Schedule II narcotic substance, nor is it cocaine hydrochloride. Thus, the logic of the Government in obtaining two superceding indictments which continued to charge the defendant with possession of, and possession with intent to distribute a Schedule I and II narcotic substance is incorrect, illogical and apparently absurd.

It is submitted that the Government cannot charge a defendant with possession of a drug that it knows, by its own report and investigation that the defendant did not possess. Such an action would be fruitless, at best, and would ordinarily result in a groundless and pointless deprivation of the defendant's constitutional rights. Such would also be the nature of an action on the part of the

Government in charging a defendant with distributing and possessing with intent to distribute a drug that it also knows the defendant did not possess. It is a simply and basic point of law. A defendant cannot be convicted of conspiring to sell a controlled substance if the substance he is alleged to have conspired to sell is not in fact a controlled substance. For one cannot be charged with conspiring or intending to sell something and allegedly conspire to and sell something else, and still be held responsible for his original intention. For example, if one is charged with intent to steal a certain item from a store, and one decides at the last minute to pay for that item, one cannot be charged with intent to steal that item from the store.

It would therefore appear that testimony to the Grand Jury as to the nature of the substance allegedly seized from the defendant-appellant was at some point perjurious. The indictment regarding the cocaine must necessarily have been based on incorrect testimony. The subsequent actions of the Government based on such testimony, were therefore pointless.

Further, the variance between the factual situation involving the alleged criminal activities of the defendant-appellant, and the charges as handed down by the Grand Jury in each and every one of the three indictments

is so great as to substantially prejudice the rights of the defendant-appellant herein. For, most obviously, it was upon ungrounded charges that the defendant-appellant was initially and continued to be incarcerated.

It must be conclusively stated hereat that the substance with which the defendant-appellant was finally charged in the last superceding indictment, and, in fact, in all of the indictments as possessing and as possessing with intent to distribute and as conspiring so to do was <u>not</u> at any time and in any manner a controlled or proscribed substance. The indictment, which was obviously and patently unfounded on its face must therefore be dismissed, in order that the Constitutional rights of the defendant-appellant be upheld.

POINT III

THE HEARING HELD ON JUNE 11 AND 12, 1973, EVEN THOUGH LABELED AS A 'BAIL HEARING' OR A 'BAIL MODIFICATION HEARING' WAS OBVIOUSLY A HEARING INTO THE SUBSTANCE AND 'PROBABLE CAUSE' OF THE ALLEGED CRIMINAL ACTIVITIES OF THE DEFENDANT-APPELLANT, AND THUS AMOUNTED IN ALL RESPECTS TO A PRELIMINARY HEARING.

The Government has attempted to prove that the hearing held in this matter was, in fact, simply a hearing to determine whether or not the defendant-appellant's bail should be raised; it contends that the testimony at the hearing simply concerned the defendant's ties to the community and the likelihood of his flight from the jurisdiction.

It is suggested that in light of the undisputed facts herein, this hearing, no matter what one chooses to call it, was a hearing that inquired, in depth, into the nature of the alleged crime and the merits of the charges against the defendant-appellant. Whether called a bail hearing or a probable cause hearing or a preliminary hearing, the hearing of June 11 and 12, 1973 dealt with the substantive issues of the alleged criminal activities of the defendant-appellant. It is therefore of no matter what the Government or the Clerk of the Magistrates Court intends to call such a hearing.

See: Moore's Federal Practice, Rule 5.1.02

The hearing lasted two days, June 11 and 12, 1973. It encompassed five reels of tape recording. It is illogical and an insult to this Honorable Court to ask it to believe that such a lengthy hearing would solely revolve around testimony as to the defendant's position in the community and his chances and prospects for flight from prosecution.

In addition, agents of the BNDD were called by the Government to testify at the hearing. The Government holds that only one agent testified (pp. 44-46). However, by sworn affidavit of an entirely different agent other than the one the Government' contends had actually testified, that is, by the affidavit of Frederick S. Lough, of the BNDD dated November, 1973, the Government's own agent, Mr. Lough states:

> "On June 11 and 12 I testified before United States Magistrate Sol Schreiber at a hearing to have the bail of Jeremiah Scanlon increased. I testified as to what I had witnessed and observed in my capacity as surveillance agent in the above captioned case (U.S.A. v. Scanlon)."
>
> "At this bail increase hearing Special Agent Thomas Fekete also testified. His testimony concerned undercover conversations with the defendant Scanlon..."

This is a statement by the Government's own

witness!

Further, Roland Thau, Esq., the attorney for the defendant-appellant at the June 11 and 12, 1973 hearing has submitted a sworn affirmation and supplementary affirmation, the later dated November 21, 1973 stating that both agents actually testified at the hearing. He affirms, in part:

> "Two witnesses testified at the hearing, both BNDD agents. Agent Fred Lough (phonetic) testified that he was a surveillance agent who observed the defendant inside an automobile in the company of undercover agent Fekethe (phonetic)."
>
> "...Agent Fekethe testified at some length about negotiations conducted between himself and the defendant..."
>
> "...Agent Fekethe testified that the defendant never passed to him or handed the contraband, in this case..."

and the defendant-appellant has concurred with this summary.

It is patently absurd to accept the Government's position in light of such contradictory testimony. However, the Government's motives are neither important nor at issue at this time. The affidavits submitted by the Government are crystal clear. Is this testimony the substance of a bail hearing?

Mr. Thau contends, finally, in his affirmation of October 30, 1973:

> "The affirmant believes that the evidence at the hearing went to the very heart and evidentiary merits of this case and not simply to a matter of roots to the community and possibility of flight by the defendant. It is my view that the testimonies (y sic) given by the agents at the hearing are vital to the defense of Mr. Scanlon's case as counsel could not in good conscience proceed to trial without all testimony heretofore given by material witnesses concerning the factual details of the alleged transaction."

Such testimony concerned the arrest, the alleged criminal activity, and the merits of the charges against the defendant-appellant. Testimony of this nature from agents of the BNDD cannot conceivably be remotely relevant to the defendant's position in the community, or to his prospects of fleeing from prosecution or any to any other issues which are normally raised at a bail modification hearing. When two such agents are called to testify, as it appears occurred herein, the position of the Government becomes preposterous.

Despite the Government's contention that this was simply a bail modification hearing,there can be no no question but that this hearing went directly to the heart, substance and evidence of the charges against the defendant-appellant. If the Government recoils at the label 'probable cause hearing,' it must yet be forced to

concede nevertheless, that the true evidentiary nature and substance of the crime at issue was under investigation at that two day hearing. Perhaps what the Government had attempted to do was to prove probable cause as a reason for raising the defendant-appellant's bail. Such tactics cannot be countenanced and are no excuse before this Court. However, as stated, the Government's motives are of no matter. The hearing held on June 11 and 12, 1973 and lasting for a period requiring five (5) reels of tape recording did without question delve into the nature of the charges against the defendant. The sworn testimony of the Government's own witnesses supports this point. It is insulting, illogical, and patently unjust to call such a hearing a simple 'bail modification hearing'. The hearing, by any name, was in substance a preliminary hearing and must be viewed and evaluated as such.

POINT IV

FAILURE TO PROVIDE DEFENSE COUNSEL WITH MINUTES OF THE HEARING OF JUNE 11 AND 12, 1973, WAS SO PREJUDICIAL TO THE DEFENDANT-APPELLANT AS TO WARRANT A DISMISSAL OF THE INDICTMENT HEREIN.

As stated in U.S. ex rel Wheeler v. Flood, 269 F. Supp. 194, a substantive hearing such as that held in the instant case is of the utmost importance to defense counsel in preparing his defense. Therefore, by extension, failure to provide counsel with a transcript of these proceedings is in direct conflict with the law and a blatant violation of the due process clause of the Fifth Amendment to the United States Constitution.

For, as the Court held in Wheeler, supra, such a transcript:

> "may provide the defense with the most valuable discovery technique available to it."

And, further, the Court deciding the case of Britt v. North Carolina, 404 U.S. 226, although affirming the decision of the lower Court, held conclusively that:

> "The Courts have consistently recognized the value to a defendant of a transcript of prior proceedings without requiring a showing of need tailored to the facts of the particular case."

In Washington v. Clemmer, 339 F. 2d 7;5

it was again contended by the Court that:

> "absence of a transcipt of testimony at a preliminary hearing makes it difficult, if not impossible, to review commissioner's finding of probable cause."

For, according to Moore's Federal Practice, Rule 5. 1. 02:

> "Although the purpose of the preliminary hearing seems to be confined to avoidance of unreasonable pretrial detention, its function is somewhat broader. In practice, the preliminary hearing may serve as a valuable device to discover the prosecution's case, particularly in the absence of other effective means of pre-trial discovery." (emphasis original).

Such a transcript is unquestionably vital to the defendant in challenging the later testimony of witnesses called at trial, attempting to bring to light contradictions or inconsistencies in their statements, and, even most simply, to refresh a memory. These minutes have been consistently held to be an invalauble source of discovery.

And, to the point:

> "... Any verbatim recording of testimony at an early stage of the process perpetuates the fresh memory of witnesses, making it available in case of subsequent death, disability, or flight, and allowing impeachment or refreshing

> of recollection at trial. "
> "Accordingly, early recording also serves to discourage threats against witnesses and suborning perjury."
>
> Washington v. Clemmer, supra, at 717.

In Britt v. North Carolina, supra the decision of the lower Court was affirmed. However, the situation in Britt is easily and clearly distinguishable from the case at bar. In Britt, a mistrial was originally had and a new trial ordered. The new trial was to be before the same judge, prosecutor and defense attorney as the first trial. The same court reporter was also to be present. Thus, in affirming the decision of the lower court, the Court held that such a decision had to be viewed within the immediate circumstances of the situation in that case. Justice Douglas, in his dissenting opinion in Britt, quotes law professor Robert Keeton, who held:

> "If you have caught a witness in a contradiction it is the more clearly shown if the exact words previously used by the witness are brought to the jury's attention."

Thus, as above noted at length, the Courts have consistently held that the defense must be given a transcript of any and all preliminary proceedings.

In this case, however, the Court below denied

defendant's motion to dismiss the indictment on the basis of the unavailability of a transcript of the hearing held June 11 and 12, 1973. Said recording had been determined by counsel and by the Court's own specialist in recordings to be unintelligible, and therefore no transcript of those proceedings could be had.

Rule 5. 1. (c) of the Federal Rules of Criminal Procedure states, however:

> (c) Records: After concluding the proceeding the federal magistrate shall transmit forthwith to the clerk of the district court all papers in the proceeding. The magistrate shall promptly make or cause to be made a record or summary of such proceeding.
>
> (1) On timely application to a federal magistrate, the attorney for a defendant in a criminal case may be given the opportunity to have the recording of a hearing on preliminary examination made available for his information in connection with any further hearing or in connection with his preparation for trial. The court may, by local rule, appoint the place for and define the conditions under which such opportunity may be afforded counsel.
>
> (2) On application of a defendant addressed to the court or any judge thereof, an order may issue that the federal magistrate make available a copy of the transcript, or a portion thereof, to defense counsel..."

The Court below, however, attempted to offer defense counsel what it deemed to be alternatives readily

available in light of the absence of the minutes it was responsible to have prepared. The Court suggested recalling the attorneys present at that time; and even recalling the Magistrate who was sitting at that hearing.

However, it is submitted that none of these alternatives can in any manner meet the due process requirements which can only be satisfied by supplying the defense with an actual transcript of the hearing.

U.S. ex rel Wilsonv. McMann,
408 F. 2d 896;
Washington v. Clemmer, supra.

A U. S. Magistrate in the United States District Court for the Southern District of New York, sitting in 1973 or 1974 who has since sat at hundreds of hearings and who had sat at thousands of hearings before June 11 and 12, 1973, cannot be expected to remember what was said at that one hearing on June 11 and 12. Perhaps a century ago this might have been a plausible alternative; certainly not now. One could recall Mr. Thau, the attorney for the defendant-appellant at that June 11 and 12 hearing to testify as to what was said; however this information was in fact, acquired through the attorney's affirmation. Counsel would be hard put to recall the agents who testified since the Government continues to hold to the position that only one agent testified when, in fact, there is sworn testimony that two agents testified.

In this sense the Government wishes to have its cake and also eat it. The Government agrees to the acceptability of recalling the witnesses at the hearing but only if the Court recalls only those witnesses that the Government asserts had testified.

Each of these alternatives attaches to the initial point at hand. It is unquestionably important to have the testimony, the discovery, the facts that were testified to at that hearing. As stated, such a hearing is an invaluable discovery tool. But further, the actual testimony, the actual transcript in black and white and on paper must be in the hands of defense counsel if he is to effectively examine the witnesses who are recalled later at trial and attempt to impeach their testimony. As the Court stated in Washington v. Clemmer, supra, and in Britt, supra, the actual in-hand testimony is in no way replacable by way of recalling witnesses, affidavits or notes.

For the Court stated, in Washington, supra:

> "... that the summary notations in the Commissioner's record of proceedings fail to provide a sufficient basis for reviewing the determination of probable cause. There are inherent inadequacies in any notes offered in lieu of a transcript. (Emphasis added).

In U. S. ex rel Kelly v. Wilson, 408 F. 2d 896, the defense was forced to rely on its own recollection of what had occured in a previous proceeding and such forcible

reliance resulted in irreversible prejudice to the defendant. There thus can be no alternative or substitute for the actual testimony and a transcript thereof as it was given in the original proceeding.

It is submitted that the Court has held without question that the transcript of such a hearing as was held here is absolutely invaluable and cannot be in any manner replaced by notes, recalling of witnesses, etc. The actual in-hand possession of typewritten or recorded minutes of a hearing such as that held in this case must be given to counsel for the defendant. Only in this way can the defendant's constitutional rights be protected and only in this way can a fair trial be had.

POINT V

COUNSEL MOST RESPECTFULLY PROCEEDS IN HIS CAPACITY AS A FRIEND OF THE COURT IN URGING THAT THE INDICTMENT HEREIN BE DISMISSED.

It is in a dual capacity that counsel wishes to press that the indictment in this matter be dismissed: on behalf of the defendant-appellant and as a friend of the Court, on behalf of future defendants.

For the failure to provide defense counsel with a transcript of the hearing herein due to the faulty operation of the recording machines is an absolute violation of defendant's constitutional rights. It is, further, something that can happen easily enough again to another defendant, and another. Counsel appeals as a friend of the Court for the relief requested and in stressing the gravity of what has occured in this case. If the recording machines are to be used in this Court in the future they must be properly manned, operated, maintained and utilized. If machines are morelikely to fail than men then official Court stenographers should be utilized. Federal funds should be requested, if necessary. If the defendant-appellant had appeared before a lower State or City tribunal for a preliminary hearing an official court stenographer would have been on hand to transcribe the offical court proceedings.

Such an incident as occured here cannot be allowed to occur again.

It is submitted that as a result of the failure of a tape recording machine the defendant-appellant herein was denied his constitutional rights. Such an obvious injustice cannot stand before this Court and thus, the indictment herein must be dismissed.

CONCLUSION

In light of the aforementioned circumstances and facts, the indictment herein must be dismissed and the conviction of Mr. Scanlon reversed.

Respectfully submitted,

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